GOPAL NAGAIAH

v.

AM GENERAL INSURANCE BHD

HIGH COURT MALAYA, IPOH
LEE SWEE SENG J
[CIVIL APPEAL NO: 12B NCVC-9-01-2014]
20 OCTOBER 2014

ROAD TRAFFIC: *Insurance – Duty of insurers – Duty to satisfy third party claims – Motor accident in oil palm estate road – Lorry covered under insurance policy – Judgment obtained against insured – Recovery of judgment debt from insurer – Whether injuries sustained by third party arose out of use of a motor vehicle on a 'road' within meaning of Road Transport Act 1987 – Whether insurer need only to pay under insurance policy if accident happened on a 'road' – Whether insurer could disclaim liability in recovery action – Road Transport Act 1987, ss. 90, 91(1)(b), 95(e), 96(2) & (3)*

ROAD TRAFFIC: *Road – Definition of – Whether road in palm oil estate a 'road' within meaning of Road Transport Act 1987 – Whether there was distinction between public road and private roads – Whether meaning of 'road' should be given restricted meaning or its ordinary basic meaning – Whether public should have access to 'road' – Road Transport Act 1987, s. 2*

WORDS AND PHRASES: *'Road' – Section 2, Road Transport Act 1987 – Meaning and scope - Whether means all roads to which public had access*

The appellant had obtained judgment against the driver and owner of a lorry in the Sessions Court following a road accident in an oil palm estate on 10 February 2003. The said lorry was covered under an insurance policy issued by the respondent. After having obtained the judgment, the appellant begun a recovery action against the respondent under s. 96(1) of the Road Transport Act 1987 ('Act') to recover the judgment debt. The Sessions Court that heard the recovery action dismissed the appellant's claim on the ground that the respondent need only to pay under the insurance policy if the accident happened on a "road" and the so called road in the oil palm estate was not a "road" within the meaning of the Act. Thus the liability of the insured was not one covered under s. 91(1)(b) of the Act. Dissatisfied with that decision, the appellant appealed. The appeal revolved around the proper interpretation of the relevant provisions of the Act. The issues that arose for determination *inter alia* were (i) whether any usage of a motor vehicle that caused injury or death to the appellant was covered under the insurance policy and not where the motor vehicle was used; (ii) whether the context in which the word "roads" was used in the definition of "motor vehicles" was much broader than the definition of "road" in s. 2 of the Act; (iii) whether the respondent could avoid liability after judgment had been taken

against its insured in the Sessions Court; (iv) whether the road on which the accident took place was nevertheless a "road" within the meaning of the Act in that the public had access to it.

Held (allowing appeal; attributing liability on respondent):

(1) The Parliament's concern was with respect to injuries or death sustained by a third party as a result of a person's use of a motor vehicle and not with respect to where the motor vehicle was used. So long as one's use of a motor vehicle may cause injury or death to a third party, one was said to be using a motor vehicle and hence, one must take out an insurance policy. It was no defence to say that one's usage of the motor vehicle was on a private road managed privately and hence there was no need for one to take out such an insurance policy. (paras 6 & 7)

(2) The paternalistic purpose of Parliament as expressed in the preamble to the Act was "for the protection of third parties against risks arising out of the use of motor vehicles" and not "for the protection of third parties against risks arising out of the use of motor vehicles on a road". Being a social piece of legislation with its prime purpose of protecting innocent lives, a more expansive interpretation should be given to it. Hence, "any liability ... in respect of the death or bodily injury to any person caused by or arising out of the use of the motor vehicle" under s. 91(1)(b) of the Act must not be unnecessarily and narrowly confined to use "on a road". (paras 9 & 10)

(3) Consistent with the intention of Parliament to ensure that all those innocent who were injured or who died because of road accidents should not be without protection, both s. 90 and s. 91(1)(b) of the Act does not restrict the meaning of "road" but gives the word "road" its ordinary basic meaning as covering all land on which a motor vehicle would ordinarily be able to move from one point to another and hence may cause injury to someone using the road. That would be consistent with its social objective of granting protection to innocent road users whose injuries or even death may be caused by a moving motor vehicle. (para 25)

(4) Where an ambiguity arose as to whether the legislature had used a general expression in its narrower or in its wider sense, the court will place that meaning upon the expression which would most effectually carry out the object of the section. The need for Parliament to define the meaning of "use" in s. 2 of the Act to mean "use on any road" rather than "use on road" would suggest that it was not the type of road that was important but more a stress on the fact that "any public road and any other road to which the public had access". (paras 26 & 27)

(5) A common approach was to be adopted in putting a meaning to the word "road" as used in the definition of "motor vehicle" under s. 2 of the Act. This view was further fortified by the fact that under s. 95(e) of the Act, so long as a motor vehicle was used and injury or death was caused to a third party, there would lie a claim against the insured. Any restrictions on the area of use of the motor vehicle would be of no effect. (paras 28 & 29)

(6) "Road" according to the Act would include any road where the public had access even if such a road was maintained by a private person and would only exclude any road maintained by a private person or a private body in which the public had no access. The courts in doing justice to the injured third party are inclined to interpret the proviso to the definition of "road" in such a manner as would allow the claim against the insurance company, and would not allow the insurance company to escape liability on flimsy grounds after having pocketed the premium. (paras 32 & 33)

(7) Section 96(1) of the Act was clear in that once judgment had been entered against an insured by a third-party in respect of a liability ordinarily covered by the policy of insurance, the insurer must pay unless it could bring itself within any of the exceptions referred to in s. 96(2) and (3) of the Act. The respondent as insurer had not begun a proceeding to obtain a declaration from a court that the insurance was void or unenforceable because it was not an accident that had taken place on a "road". Under s. 96(1) of the Act a plaintiff in a motor accident negligence case who had obtained a judgment in his favour against the defendant was entitled to enforce that judgment against the defendant's insurer without need to commence separate recovery proceedings against the insurer. (paras 35, 36 & 39)

(8) The insured and the driver of the lorry had never disputed that the accident happened on a "road", and also had alleged contributory negligence on the part of the appellant. Having permitted the insured there to plead contributory negligence in its defence, the insurer, the respondent, was estopped from taking a different stand and had waived its right to contend that the road was not a "road" within the meaning of the Act. (paras 41 & 42)

(9) There was no evidence from the respondent that the appellant had entered the estate road illegally or that he was a trespasser. There was sufficient evidence to conclude that the public was allowed access into the estate if they have business to conduct there and that the estate roads were roads within the meaning of "road" under the Act. (paras 45 & 48)

(10) Bearing in mind the photographs of the estate road, the appreciation of economic and business activities generally present in an estate of such a nature, the fact that visitors were allowed to enter the estate, the trial judge should have concluded that it was a road where the public had access and thus qualified to be a "road" within the meaning of the Act. Therefore the accident in the estate road was a case where the injuries sustained by the third-party arose out of the use of a motor vehicle on a "road" within the meaning of the Act. As such the respondent could not disclaim liability in this recovery action. (para 50)

Case(s) referred to:

Bank of Australasia v. Hall [1907] 4 CLR 1514 ***(refd)***
Govinaraju Nagarajan v. Pacific & Orient Insurance Co Bhd [2014] 1 CLJ 1076 HC ***(refd)***
Kurnia Insurans (M) Berhad v. Nik Mohd Faizul Nik Mustafa & Anor [2013] 1 LNS 40 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Lim Kim Tong [2006] 8 CLJ 444 HC ***(refd)***
Tahan Insurance Malaysia Bhd v. Ong Choo Tian & Anor [2004] 7 CLJ 270 HC ***(refd)***

Legislation referred to:

Motor Vehicles (Third-Party Risks And Compensation) Act, ss. 2, 4(1)(b)
Road Transport Act 1987, ss. 2, 4(1)(b), 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91(1)(b), (4), 95, 96(1)(b), (2), (3)

For the appellant - Inderjit Singh; M/s Sandu & Assocs
For the respondent - Omar Bakhi Ahmad; M/s VP Nathan & Partners

[Appeal from Sessions Court, Teluk Intan; Summon No: 52-156-10-2012]

Reported by Sandra Gabriel

JUDGMENT

Lee Swee Seng J:

[1] The plaintiff/appellant had obtained judgment against the driver and owner of a lorry WDM 8564 in the Sessions Court in Teluk Intan in Summons No. 53-181-2003 following a road accident on 10 February 2003 at Jalan Ladang Rubana in an oil palm estate. The said lorry was covered under an insurance policy issued by the defendant/respondent. After having obtained judgment, the plaintiff had begun a recovery action against the defendant under s. 96(1) of the Road Transport Act 1987 ("RTA") to recover the judgment debt.

[2] The Sessions Court that heard the recovery action had dismissed the plaintiff's claim on ground that the insurance company need only to pay under the insurance policy if the accident happened on a "road" and the so-

called road in the oil palm estate was not a "road" within the meaning of the RTA. Thus the liability of the insured is not one covered under s. 91(1)(b) of the RTA.

[3] Dissatisfied with that decision the plaintiff had appealed to this court. The parties shall be referred to as they were in the Sessions Court, ie, as plaintiff and defendant.

Problem

[4] The defendant contended that they need not have to pay under the insurance policy for under s. 91(1)(b) of the RTA, they only need to pay if the accident had arisen out of the use of the motor vehicle on a "road". The defendant further argued that under the definition of road in s. 2 of the RTA, it is expressly excluded "any private road, bridge, tunnel or anything connected to that road which is maintained and kept by private persons or private bodies."

Principles

[5] The issue revolves around the proper interpretation of the relevant provisions of the RTA. It cannot be denied that the RTA is a social piece of legislation designed to protect those who may be injured as a result of using the roads. As statistics would have it, road accident is the highest cause of death in the country. Parliament in performing its paternalistic role has criminalise the action of anyone using any motor vehicle without one taking out an insurance policy covering third party risks. Section 90(1) of the RTA reads as follows:

> (1) Subject to this Part, **it shall not be lawful for any person to use** or to cause or permit any other person to use, **a motor vehicle** unless **there is in force in relation to the user of the motor vehicle** by that person or that other person, as the case may be, **such a policy of insurance** or such a security **in respect of third party risks** as complies with the requirements of this Part.
>
> (2) If a person acts in contravention of this section he shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding three months or to both and a person convicted of an offence under this section shall, unless the court for special reasons to be specified in the order thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified from holding or obtaining a driving licence under Part II for a period of twelve months from the date of the conviction. (emphasis added)

Whether Any Usage Of A Motor Vehicle That Causes Injury Or Death To A Third Party Is Covered Under An Insurance Policy And Not Where The Motor Vehicle Is Used

[6] As can be seen, Parliament's concern is with respect to injuries or death sustained by a third party as a result of a person's use of a motor vehicle and not with respect to where the motor vehicle is used. If Parliament had wanted to criminalise the act of not taking out a policy of insurance for use of a motor vehicle only if the use of it is on a road and not otherwise, it could easily have added the words "on a road" after the words "a motor vehicle" as follows:

> (1) Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle (on a road) unless there is in force in relation to the user of the motor vehicle (revised version for illustration purpose only)

[7] For so long as one's use of a motor vehicle may cause injury or death to a third party, one is said to be using a motor vehicle and hence one must take out an insurance policy and it is no defence to say that one's usage of the motor vehicle was on a private road managed privately and hence there is no need for one to take out such an insurance policy.

[8] Even the very Preamble to the Act reads:

> An Act to make provision for the regulation of motor vehicles and of traffic on roads and other matters with respect to roads and vehicles thereon; to make provision for the protection of third parties against risks arising out of the use of motor vehicles; to make provision for the co-ordination and control of means of and facilities for transport; to make provision for the co-ordination and control of means of and facilities for construction and adaptation of motor vehicles; and to make provision for connected purposes.

[9] The paternalistic purpose of Parliament as expressed in the Preamble to the Act is "for the protection of third parties against risks arising out of the use of motor vehicles" and not "for the protection of third parties against risks arising out of the use of motor vehicles on a road". If Parliament had wanted the protection to be given to third parties only if the motor vehicle had been used on a road, it could easily have used the words "on roads" as it had used the words "on roads" and "to roads" in the phrase before.

[10] Very obviously the concern of Parliament is on injuries or death caused by one using a motor vehicle howsoever and wheresoever one might be using it. One is of course only too conscious of the fact that speed kills and negligence can mar and maim a life. Being a social piece of legislation with its prime purpose of protecting innocent lives, a more expansive interpretation should be given to it. Hence "any liability ... in respect of the death or bodily injury to any person caused by or arising out of the use of

the motor vehicle" under s. 91(1)(b) of the RTA must not be unnecessarily and narrowly confined to use "on a road". Section 91(1)(b) of the RTA reads:

> any liability which may be incurred by him or them in respect the of death or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road. (emphasis added)

[11] There are thus two situations described in the above s. 91(1)(b) of the RTA. One is that "arising out of the use of the motor vehicle" and the other is "arising out of the use of the land implement drawn thereby on a road". The expression "drawn thereby on a road" qualifies the "land implement" and not the "motor vehicle" as a "motor vehicle" is powered by fuel and the engine whereas a "land implement" has to be drawn by something pulling it.

[12] A "land implement" under the RTA does not operate alone but in connection with a "tractor" as is clear from its definition in s. 2 of the RTA as follows:

> "land implement" means any implement or machinery used with a land tractor in connection with the purposes for which a land tractor may be used under this Act;

[13] Correspondingly a "land tractor" is defined to mean as follows in s. 2 of the RTA:

> "land tractor" means a motor tractor designed and used primarily for work on the land in connection with agriculture, planting or forestry, land levelling, draining, dredging or similar operations, which is driven on a road only when proceeding to and from the site of such work and when so driven hauls nothing other than land implements;

[14] As a "land implement" is to be inextricably used with a "land tractor" and as a "land tractor" is covered when "driven on a road only" and not when it is working on the land, it becomes necessarily for the avoidance of doubt to use the expression "the use of the land implement drawn thereby on a road".

[15] If the intention of Parliament was to confine both the use of the motor vehicle and the land implement on a road, we would have expected the section to read as follows:

> ..., arising out of the use of the motor vehicle or land implement on a road. (revised version for illustration)

[16] The equivalent RTA in Singapore is their Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189 2000 Rev Ed)) ("M V (T-P R & C) A"). In the M V (T-P R & C) A, the provision which requires motor insurers to pay damages awarded against their insured is s. 4(1)(b):

A (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or **arising out of the use of the motor vehicle** in Singapore and in any territory specified in the Schedule. (emphasis added)

B **[17]** Their s. 4(1)(b) bears striking resemblance to our s. 91(1)(b) and one can safely surmise that they both have the same origin. One can appreciate that Singaporean being not an agrarian society, the part on the use of "a land implement thereby drawn on a road" would not be relevant and has been omitted in the Singapore legislation. However they have understood the C coverage of the insurance policy to cover any death or injury caused to a third-party "arising out of the use of the motor vehicle" and not so much as whether the motor vehicle is being used on a "road".

[18] Their definition of "road" in the Singaporean legislation in s. 2 means "any public road and any other road to which the public has access, and D includes bridges over which a road passes."

[19] For so long as a motor vehicle, used on public roads or roads to which the public has access, can cause death or injury to someone, that would be sufficient use that is envisaged under the RTA and in particular s. 91(1)(b).

E *Whether The Context In Which The Word "Roads" Is Used In The Definition Of "Motor Vehicles" Is Much Broader Than The Definition Of "Road" In s. 2 RTA*

[20] It is true that the definition of "motor vehicle" in s. 2 of the RTA means "a vehicle of any description, propelled by means of mechanism F contained within itself and constructed or adapted so as to be capable of being **used on roads**, and includes a trailer." (emphasis added)

[21] The question is whether the "roads" used in the above definition has the meaning assigned to "road" in the definition in s. 2 which reads as follows:

G 2. Interpretation

"road"

means:

(a) **any public road and any other road to which the public has access** H and includes bridges, tunnels, lay-bys, ferry facilities, interchanges, round-abouts, traffic islands, road dividers, all traffic lanes, acceleration lanes, deceleration lanes, side-tables, median strips, overpasses, underpasses, approaches, entrance and exit ramps, toll plazas, service areas, and other structures and fixtures to fully effect its use; and

I (b) for the purposes of sections 70 and 85, also includes a road under construction,

but shall not include any private road, bridge, tunnel or anything connected to that road which is maintained and kept by private persons or private bodies.

(emphasis added)

[22] Like all interpretation section, the introductory rider as seen here in this section is this:

In this Act, unless the context otherwise requires

[23] In other words, is the context in which the word "road" is used such that it must of necessity exclude "private road" which is "maintained and kept by private persons"?

[24] Part III is a whole part of the Act entitled "ROADS" from ss. 67 to 88. It can be seen that in those contexts clearly the legislature is not interested in and has excluded "private road maintained and kept by private persons". In s. 68 which deals with the Minister preparing a Highway Code for persons using roads, surely it cannot be referring to "private roads". Likewise too speed limits in s. 69 which refers to "the Minister prescribing a national speed limit for all roads in Malaysia". Section 70 refers to the power to restrict use of vehicles on specified roads; again the draftman is not interested in "private roads". Again "private roads" must be excluded where provisions of parking places under s. 72 is concerned. One can also look at s. 77 on erection of traffic signs which has no relevance on "private roads". The other examples are in s. 78 on power to set up road block, s. 81 on restriction on competitions and speed trials, s. 83 on power to erect refuges, subways and foot-bridges, s. 84 on power to remove structures from roads. The point to be made is that no one would want to quarrel that "roads" especially in the various contexts in Part III of the RTA would exclude private roads.

[25] However, consistent with the intention of Parliament to ensure that all those innocent who are injured or who died because of road accidents should not be without protection, both s. 90 and s. 91(1)(b) do not need us to restrict the meaning of "road" to the definition which in reality is more appropriate for Part III of the RTA but rather allow us to give the word "road" its ordinary basic meaning as covering all land on which a motor vehicle would ordinarily be able to move from one point to another and hence may cause injury to someone using the road. That would be consistent with its social objective of granting protection to innocent road users whose injuries or even death may be caused by a moving motor vehicle.

[26] As has been held in a number of authorities, the meaning that the definition section gives to expressions are applicable "unless the context otherwise requires"; in other words the meaning given may be modified to suit the context in which it is used in the body of the text. The broadest context would be the whole Act itself. See *PP v. Dato' Seri Anwar Ibrahim*

(No. 3) [1999] 2 CLJ 215; [1999] 2 MLJ 1 at pp. 100-101. Where an ambiguity arises as to whether the legislature has used a general expression in its narrower or in its wider sense, the court will place that meaning upon the expression which will most effectually carry out the object of the section. In such cases, it becomes necessary to examine the context, the subject matter, and the object and purpose of the enactment as disclosed by its provisions (see *Bank of Australasia v. Hall* (1907) 4 CLR 1514 and *PP v. Lim Kim Tong* [2006] 8 CLJ 444 at p. 455; [2006] 5 MLJ 662 at p. 673).

[27] In fact the need for Parliament to define the meaning of "use" in s. 2 of the RTA to mean "use on any road" rather than "use on road" would suggest that it is not the type of road that is important as in a public/private road distinction but more a stress on the fact that "any public road and any other road to which the public has access" would suffice.

[28] A commonsensical approach is to be adopted in putting a meaning to the word "road" as used in the definition of "motor vehicle" under s. 2 of the RTA. In this respect the following *dicta* expressed in *Tahan Insurance Malaysia Bhd v. Ong Choo Tian & Anor* [2004] 7 CLJ 270 is helpful:

> In *Griffin v. Squires* [1958] 3 All ER 468 Lord Parker CJ held that it was for the court to decide "whether a certain space is a road". Kilner Brown J after considering a number of authorities including *Griffin v. Squires* said in *Oxford v. Austin* [1981] RTR 416:
>
> > That leads me to say in all these cases there is a well established process which is founded on findings of fact. The first question which has to be asked is whether there is in fact in the ordinary understanding of the word a road, that is to say, whether or not there is a definable way between two points over which vehicles could pass. The second question is whether or not the public, or a section of the public, has access to that which has the appearance of a definable way.
>
> Of course in *Griffin v. Squires* the issue was whether a car park could be considered a road and the court held that notwithstanding the fact that there was an ingress to the car park from the highway and an egress from the car park leading out to the road, nobody in the ordinary acceptance of the word 'road' would think of a car park as a road.
>
> However the court was also of the view that to hold a car park as a road there must be some evidence to show that in addition to being a car park, the place is used, *inter alia*, as a thoroughfare or shortcut for vehicles between two points outside of it.
>
> As Lord Sands said in *Harrison v. Hill* [1932] SC (J) 13 at p. 17:
>
> > Any road may be regarded as a road to which the public have access if it is a road upon which members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of a prohibition express or implied.

[29] This view is further fortified by the fact that under s. 95 of the RTA, no part of the insurance policy that restricts the insurance of the persons insured with respect to "(e) the times at which or the **areas within which the motor vehicle is used**, would be of no effect." (emphasis added) It reads as follows:

> 95. Avoidance of restrictions on scope of third party risks policies
>
> Where a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured by reference to any of the following matters:
>
> ....
>
> (e) the times at which or **the areas within which the motor vehicle is used**;
>
> shall, as respects such liabilities as are required to be covered by a policy under paragraph 91(1)(b), **be of no effect**: ... (emphasis added)

[30] The rationale is obvious; for so long as a motor vehicle is used and injury or death is caused to a third party, there would lie a claim against the insured. Any restrictions on the area of used of the motor vehicle would be of no effect.

[31] There has also been a significant amendment introduced by the Road Transport (Amendment) Act 2011 Act A1391 which came into force 31 January 2011 where the following words in bold were deleted:

> but shall not include any private road, bridge, tunnel or anything connected to that road which is maintained and kept by private persons or private bodies.

[32] The amendment clarifies and removes what was doubtful to some as to whether "road" would include "any private road maintained by private persons". Now that those words above have been removed, we need only to determine if it is a public road or any other road to which the public has access. The moment it can be shown that the public has access to it, it does not matter that ordinarily the road is a private road maintained by private persons. The palpable shift from what was latent to now patent, is that the legislature is concerned not with the public/private dichotomy but the public access/no public access dichotomy. It was not a case where Parliament was less caring where accidents had happened in private estate roads and injuries sustained or death caused. Thus even in its unamended version which was the version in force when the accident took place, interpreting the meaning of "road" taking the proviso into consideration and also in maintaining internal consistency with the whole Act, one would say that "road" would include any road where the public has access even if such a road is maintained by a private person and would only exclude any road maintained by a private person or a private body in which the public has no access.

[33] Courts in doing justice to the injured third party had tried to interpret to proviso to the definition of "road" in such a manner as would allow the claim against the insurance company even if it may appear to be straining the language used so as not to allow the insurance company to escape liability on flimsy ground after having pocketed the premium. One must avoid the error of straining a gnat and swallowing a camel! In *Tahan Insurance Malaysia Bhd v. Ong Choo Tian & Anor* [2004] 7 CLJ 270, the accident took place in a private property as the car was being reversed into a five-foot way. In a recovery action against the insurance company, it was held as follows:

> In the circumstances therefore it is clear that in respect of the case before me, the public indeed had access to the five-foot path. I would have thought that if there indeed was any dispute that the five-foot path was not open to the public, the defendant would have at least produced photographs showing the five-foot path and the restrictions if any, to take it off from falling into the category of 'a road'.
>
> The next issue to consider is whether the defendant insurers are liable notwithstanding the fact that when the accident occurred the plaintiff was on private property.
>
> To my mind this court cannot and ought not separate the series of acts of the defendant driver Yeow on that eventful day. Firstly she was unfamiliar with the use of that car. Yet she attempted to drive it. When the first step towards establishing negligence on the part of Yeow was established, the plaintiff's evidence showed that the car was in a reversed position and on the five-foot path. In other words as held by me, the car was on the road. Obviously Yeow intended to reverse out onto the main road. Instead of engaging the reverse gear she had, as admitted in her police report engaged the forward gear. At the precise moment when the negligent act occurred, part of her car was clearly on the road. The subsequent act of wrongly putting the car into forward motion and thus causing the injury was the negligent act, arising out of the use of the car on the road. I am fortified in holding this view by referring to the case of *Randall v. Motor Insurance Bureau* [1969] 1 All ER 21. The facts of that case were that a motor lorry driven by S was on a driveway on private land. As S drove from the driveway to the adjacent road the offside wing of his lorry struck the plaintiff causing him to fall. The rear wheel then ran over the plaintiff's left leg causing serious injury. At the time when the wheel passed over the plaintiff's leg the front wheels of the lorry were on the road. The plaintiff obtained judgment against S for damages for personal injuries, but the judgment was not satisfied. On the question whether the plaintiff's injury was caused by, or arose out of, the use of a vehicle on a road, under s. 203(3)(a) of the Road Traffic Act 1960, so as to make the defendants liable under their agreement of 17 June 1946, with the Minister of Transport for any unsatisfied judgment in respect of third party liability, the court held that at the time when the injury was sustained since the greater part of the lorry was on the road, therefore the lorry was using the road and, accordingly, the defendants were held liable under the agreement of 17 June 1946.

Megaw J said at p. 24 as follows: A

> The one and only question in dispute is: Was it bodily injury caused by, or arising out of, the use of the Dodge lorry on a road? In my judgment, the answer to that question on the facts of this case is "Yes". I have no doubt that in common sense and in the ordinary use of language the lorry was being used on a road - Hillsborough Road - at the time when the Plaintiff sustained the serious injury of which he complains. If anything turns on the precise time of the incident, which, again as a matter of common sense, cannot be divided into a series of separate incidents, the determining factor is the time when the wheel of the lorry ran over the Plaintiff's leg. At that time the greater part of the lorry was on the road, and the lorry as a whole was using the road. The fact the rear part of the lorry including the wheel which ran over the Plaintiff's leg, was still, just, on private property does not, in my view, affect the conclusion that the lorry was then using the road. It was the use of the lorry on the road - the fact that it was being driven further on to the road in order to drive away along the road - which caused the injury. Certainly the injury arose out of the use of the lorry on the road. The fact that the Plaintiff, when he was injured, was still - though only just - on private property and that the wheel which caused the injury was still, just, on private property does not, to my mind, affect the conclusion. The Plaintiff therefore succeeds in his claim. B C D E
>
> In the present case as I said, the series of acts are so close and proximate that just out of the use of the road, the negligent act occurred and the defendants are therefore liable. One has to clearly distinguish this case from the case of a defendant driver, who having driven along the highway and subsequently having entered into the compound negligently collides into a third party in the compound. The issue for the court to decide is how proximate was the resultant collision to his entry into the private premises from the road. In other words, when the negligent act occurred, at least a part of the car must have been on a road as defined in s. 2 of the Act. On this issue therefore, I find for the respondents. F G

[34] I would thus conclude that the meaning of "road" when used in the context of the meaning of "motor vehicle" as well as in "arising out of the use of motor vehicles" "which "use is on any road" in the Preamble to the RTA and in s. 91(1)(b) of the RTA does not require one to read it restrictively to exclude accidents that happen on private roads that are maintained and kept by private persons or private bodies for so long as the public has access to it. H

Whether The Insurer Can Avoid Liability After Judgment Has Been Taken Against Its Insured In The Sessions Court

[35] Section 96(1) of the RTA is clear in that once judgment has been entered against an insured by a third party in respect of a liability ordinarily covered by the policy of insurance, the insurer must pay unless it can bring I

itself within any of the exceptions referred to in ss. 96(2) and (3). Of relevance here as it has been raised by the defendant is s. 96(3). The relevant sub-sections in s. 96 is reproduced below:

> **96. Duty of insurers to satisfy judgements against persons insured in respect of third party risks**
>
> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements ...
>
> (3) No sum shall be payable by an insurer under subsection(1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable ...

[36] The defendant as insurer had not begun a proceeding to obtain a declaration from a court that the insurance was void or unenforceable could have brought a separate action or applied to intervene in the action between the plaintiffs here and the insured there as was done in *Govinaraju Nagarajan v. Pacific & Orient Insurance Co Bhd* [2014] 1 CLJ 1076; [2014] 8 MLJ 839.

[37] In *Kurnia Insurans (M) Berhad v. Nik Mohd Faizul Nik Mustafa & Anor* [2013] 1 LNS 40; [2013] 9 MLJ 675 at pp. 679-680, it was held as follows:

> [15] Section 96(1) of the Road Transport Act 1987 ('the RTA') provides for the duty of insurers to satisfy judgments against persons insured in respect of third party risks. The applicant, as insurer, is statutorily bound by this provision to satisfy any judgment in respect of third party risks.
>
> [16] However, the applicant sought to rely on s 96(3) of the RTA which provides:
>
> > (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:.
>
> [17] In my opinion, s 96(3) of the RTA cannot be invoked by the applicant because no sum shall be payable by an insurer under s 96(1) of the same Act 'if before the date the liability was incurred', the insurer had obtained a declaration from the court that that insurance was void or unenforceable. The alleged accident involving R1 has already occurred and it is now a past event. The applicant insurer is seeking a declaration

from the court after the alleged accident ie after the date that the liability was incurred, and not 'before' as provided in s 96(3) of the RTA. Therefore, it would not be in accordance with s 96(3) of the RTA for this court to grant a declaration that the insurance was void or unenforceable.

[18] In any case, the sessions court case was withdrawn by Messrs Karnes & Associates on 15 October 2012. In view of that, this matter has been rendered academic ie regarding the applicant's possible liability to a third party for the alleged accident.

[38] Granted that in this case the insurer would not know where the accident had taken place until it took place, it behoves then the insurer to apply for and obtain the said declaration before liability is incurred in the sense of judgment having been taken against the insured. That was not done until the current recovery action. In fact it has been held that the current recovery action is not necessary as the third-party armed with a judgment against the insured, may proceed straight to execution.

[39] Under s. 96(1) of the RTA a plaintiff in a motor accident negligence case who has obtained a judgment in his favour against the defendant is entitled to enforce that judgment against the defendant's insurer without need to commence separate recovery proceedings against the insurer. This was clearly declared to be the position in law in the Court of Appeal case of *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947; [2010] MLJU 1668; where Ramly Ali JCA (now FCJ) said at pp. 957-958:

Nowhere does s 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured. Therefore, the question of the respondent having to file a recovery proceedings under s 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer.

[40] That being the case can the insured in the defendant/respondent have more rights than if the plaintiff/appellant had proceeded straightaway with execution? I do not think so. If the insurer could not avoid the policy in the case where the plaintiff had proceeded with execution directly against the insurer, then the insurer as a corollary cannot raise the defence of avoiding the policy in this recovery action which the Court of Appeal in *Muniammah Muniandy*'s case *(supra)* has found to be unnecessary.

[41] At any rate, liability had already been incurred latest when judgment had been entered in the running down action against the insured by the Sessions Court in Teluk Intan on 16 June 2010. The defendant as the insurer had admitted that it did receive the relevant notice from the plaintiff before

the filing of his claim against the insured. Conduct of the defence would of course be in the hand of the defendant in the running down claim. It does not matter that the insurer chose not to defend the claim but instead left the insured to find its own solicitors to defend it. From the pleadings filed in the running down action and in particular the defence filed at pp. 61-63 of the record of appeal ("ROA"), the insured there and the driver of the lorry, had never disputed that the accident happened on a "road" and indeed in alleging contributory negligence on the part of the plaintiff, had averred as follows under "particulars of negligence of the plaintiffs" in para. 4 at pp. 61-62 of the ROA:

> (d) Failure to give way to other users on the **road**;
>
> (f) Failure to take proper precaution and exercise proper control whilst on the **road**; ...
>
> (h) Failure to observe the lorry No. WDM 8564 on the **road**;....
>
> (j) Failure to control motorcycle No. ABA 2206 carefully and skilfully when on the **road** ... (emphasis added)

[42] Having permitted the insured there to plead such in its defence, the insurer here as defendant is estopped from taking a different stand and indeed had waived their right to contend that the road is not a "road" within the meaning of the RTA.

[43] The defendant therefore cannot disclaim liability both under s. 96(1) of the RTA and also because in the circumstances of the case where it had allowed the defence to proceed on the basis of contributory negligence, it is estopped from contending otherwise.

Whether The Road On Which The Accident Took Place Was Nevertheless A "Road" Within The Meaning Of The RTA In That The Public Had Access To It

[44] At the trial of this action in the Sessions Court, it was agreed between the parties that the defendant should proceed with its case first and that the plaintiff would rely on the notes of evidence tendered in the agreed bundle of documents filed and duly marked as exhibits. The defendant called only one witness SD1 the adjuster. He went to the scene of the accident in the estate a year after the accident. He admitted under cross-examination that he was not sure if there were two access roads to the estate: one guarded and one not guarded. The plaintiff submitted no case to answer and relied on the evidence before the Sessions Court in the running down case.

[45] At p. 99 line 100 of the ROA, the evidence of the plaintiff in the running down case has been that he was working in the said estate as a "penebang kelapa sawit" before the accident. When the accident took place he was riding his motorcycle going back to his house at the right of the junction where the accident took place. From the photographs at pp. 78-89

and 117-120 of the ROA, it can be seen that the so-called estate roads are wide and broad and indeed well-trodden for at least two vehicles to pass through without colliding into one another. There is no evidence from the defendant's witness that the plaintiff had entered the estate road illegally or that he is a trespasser.

[46] From the pictures of the roads as shown in the bundles, it can be safely concluded that it was built to allow for movement of lorries like that of the defendant (in the running down action) in the estate to collect the oil palm fruits and for motorcycles like that of the plaintiff as an employee or worker to move about freely in the estate. Whatever might be his actual relationship with the estate, he is certainly not a trespasser for his house is even in the estate itself. There would be sufficient movement judging from the size and condition of the roads and the need for harvesting activities for the status of the estate roads to come within the meaning of "road" under the RTA in that it is a road to which the public has access. Even if he had some working relationship with the estate, there was no evidence adduced as to the status of the owner of the lorry. The access by the lorry onto the estate road, in the absence of evidence to the contrary, can be considered as sufficient access by the public as surely the court can take judicial cognisance that in an oil palm estate with mature oil palm trees and even an auxiliary police post (p. 155 ROA) and a proper signboard notice to draw the visitors' attention to the need to report to the auxiliary police post before entry (p. 155 ROA), there would be a significant number of movements in and out of the estate for all who have business dealings with it. Visitors are members of the public who are allowed access with express or tacit consent of the owner of the estate. The determinative criterion is on the nature of the road as in whether it is a public road or a road in which the public has access and not on whether the third-party injured or the insured is a member of the public.

[47] The learned Sessions Court Judge had also noted the evidence of SP1 in the running down case. He was the investigating officer and his evidence was that "Rubana Estate has no cross bar at the entrance and that public vehicles could enter the estate. There was no security checkpoint." The evidence of the lorry driver in the running down case was that "there were two roads leading into the estate and only one has guard and the public has free access using the second road".

[48] Viewed overall, there is sufficient evidence for this court to safely conclude that the public is allowed access into the estate if they have business to conduct there and that the estate roads are roads within the meaning of "road" under the RTA, having been satisfied that it is a road that the public has access.

[49] I am conscious of the principle that an appellate court should not generally interfere with findings of facts of a trial court as was held in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 at p. 33 (CLJ); p. 116 (MLJ) as follows:

A Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence**. It is, we think appropriate that we say what judicial appreciation of evidence involves.

B A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take C into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' D evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered. (emphasis added)

E **[50]** However where it is not so much a finding of fact but conclusions drawn from a finding of fact, then an appellate court is not disadvantaged in any way but may proceed to arrive at its own conclusion based on the legal principles involved in interpreting the relevant words of a statute in this case, the meaning of the word "road" under the RTA. Here the photographs of the F estate road, the appreciation of economic and business activities generally present in an estate of such a nature, the fact that visitors are allowed to enter the estate; all these if sufficiently appreciated by the trial judge would lead him to conclude that it is a road where the public has access and thus qualify to be a "road" within the meaning of the RTA such that the insurer here should not be able to disclaim liability in this recovery action.

G

Pronouncement

[51] For all the reasons given above, I am confident that the accident in the estate road was nevertheless a case where the injuries sustained by the third party had arisen out of the use of a motor vehicle on a "road" within the H meaning of the RTA. I had thus allowed the appeal and by consent of the parties, I made no order as to costs.

I